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CURRENT TOPICS

The principle embodied in the decision of Wrought Iron Bridge Co. v. Town of Utica, which we printed last week, that a municipal corporation which has acquired property *ultra vires* must compensate for it or restore it, is parallelled and extended to the case of corporations generally in the case of Manville v. Belden Mining Co., recently decided by Judge McCrary in the circuit court of Colorado. The suit was upon a promissory note for money advanced to the defendant company. The answer set up, among other things, a clause in the by-laws, as follows: "No debt shall be contracted for or in the name of the company, except by order of the board of directors, and then not in excess of the funds actually in the treasury;" and that the debt set out had not been contracted by order of the board of directors. To this answer the plaintiff demurred. Said the court: "I consider the third paragraph of the complaint as a claim for money had and received by the defendant from the plaintiff. It avers that the plaintiff advanced money to the amount of $3,166 to said defendant, at its special instance and request, and for its use and benefit. Under this allegation it will be competent for the plaintiff to prove that he furnished, advanced or loaned money to the defendant, which the defendant received and used; and if this proof is made, it will be no answer to show the limitation of the powers of the defendant, contained in the by-laws above quoted. It is insisted that under some peculiar provisions of the statute of Maine, under which this corporation was organized, its by-laws have the force and effect of charter provisions; that all persons must take notice of them. I do not inquire into the soundness of this claim, as, even if it be admitted, if the third paragraph of the complaint is true the defendant is liable. A corporation, like a natural person, may be compelled to account for the benefits received from a transaction, even if it be one not enforceable by reason of the fact that its agents have no right to make it unless it be in its nature illegal or immoral. If the agreement under which the corporation has received money or property can not be enforced, an action may be sustained without reference to the agreement to recover whatever money be justly due for the value received. A corporation that has received money or property from another, and appropriated it, can not be heard to refuse to account for it on the ground that it had no power under its charter to take it. See rule 14, p. 121, Mor. Priv. Corp. and cases cited. The demurrer to so much of the answer as sets up the defendant's want of power, as a defense to so much of the answer as is contained in the third paragraph, is sustained."

Probably the most singular sentence ever passed by a court of justice, was the one which Judge Krekel, of the United States District Court, for the Western District of Missouri, is said to have recently passed in the case of one Hannah, arraigned in that court on the charge of selling liquor to the Indians. He pleaded guilty, and gave as his excuse, his ignorance of the law, and stated that he could neither read nor write. As he was a young fellow, and it appeared to be his first offense, the court gave him some good advice, and proposed to him that he should learn to write, and to insure success, sentenced him to the Cole county jail until he should be able to write a letter. Upon the defendant expressing a doubt as to his ability to accomplish that result, the court assured him that it could be done with proper application, and to help him, assigned him a teacher in the person of one Martin, convicted of cutting timber on public land, whom he sentenced to the same jail until he should have taught Hannah to write, a task which he most willingly undertook. The desired result was accomplished within three weeks' time, and both prisoners discharged. This is a combination of compulsory education and reformatory punishment, which seems to us a very wise exercise of the court's discretion and well worthy of imitation elsewhere.

CHATTEL MORTGAGE — STOCK IN TRADE—RIGHT OF MORTGAGEE TO SELL AND RE-INVEST UNDER THE MORTGAGE.

The case of Brackett v. Harvey, New York Court of Appeals, 1883,[1] presents a very interesting point of law in relation to the right of the mortgagor, not only to sell the chattels conveyed by the mortgage, but to re-invest the proceeds of the sale of the mortgaged chattel, the property purchased therewith to be held by the mortgagor subject to the original mortgage.

It is there decided that, 1. "A chattel mortgage of a stock in trade which leaves the mortgagor at liberty to sell, is not necessarily void if the right to sell is conditioned upon the application of the proceeds to the mortgage debt. 2. Nor will the stipulation that the mortgagor may sell upon credit, taking good business paper at sixty or ninety days, render the security void, if it is accompanied by an agreement on part of the mortgagee to receive and apply such paper on the mortgage debt as cash. 3. Nor will a chattel mortgage which provides for periodical renewals be rendered void by the fact that by implication it allows the mortgagee to sell and use the proceeds of sale to replenish the stock, the provision for renewals being intended to cover such additions to the stock."

We will not review the above decision, but will refer to it in a subsequent part of this essay. It is proposed at this point of the subject to notice the history of adjudication,

On the Effect of Mortgages on Subsequently Acquired Property.—And in this connection, the right of the mortgagor, with the consent of the mortgagee, to re-invest in other personal property, to be subject to the mortgage. The history of this question shows some fluctuation in the current of decisions. "It being a rule of the civil law, that, while a mortgage is restrained to certain things, the lien of the mortgage will be extended to all such as may arise or proceed from the thing mortgaged."[2]

The right to growing crops not sown or planted, may pass by the mortgage. A person may mortgage the wool that he may have a year hence from his flock of sheep, but not on the sheep he afterwards may have.[3] A very eminent writer holds, "*qui non habet, ille non dat*," which being as fully recognized in the common law as in the civil, is of universal application. Yet the same writer remarks: "There have been of late several conflicting decisions in regard to the right of parties under a mortgage, as to property substituted for that originally encumbered by him as security for the mortgage debt."[4] Nothing can be mortgaged which in not *in esse*.

At law, a mortgage of property, not then in existence, or not belonging to the mortgagor, but to be acquired *in futuro*, is void as to that property. The authority is ample on this point, and fully cited by Herman.[5] There are cases exhibiting much research, learning and ability, in which it has been held that mortgages of after-acquired property are legal. Where the contract relates to particular property reasonably certain to come into existence, necessary to the use of something in existence, in which the mortgagor has an actual interest, so that there is a tangible basis for the contract, such a contract may be upheld in equity.[6]

Covenants to Keep up Stock under a Mortgage.—A chattel mortgage upon a stock of goods in store, may covenant that goods shall be put in to keep up the stock, and it will cover goods so put in.[7] The grantor of a bill of sale assigned to the grantee the whole of the stock-in-trade,—chattels, goods and effects in certain specified premises, and also the stock-in-trade, goods, chattels and effects, which might at any time during the

[1] 17 Cent. L. J. 112.
Herman on Chattel Mortgages, 86.

[3] Ib.

[4] Herman on Chattel Mortgages, 89.

[5] Henshaw v. Bank, 10 Gray, 571; Bellows v. Wells, 36 Vt. 599; Gale v. Burnell, 7 Q. B. 850; Head v. Goodwin, 37 Me. 181; Pierce v. Emery, 32 N. H. 484; Otis v. Gill, 8 Barb. 102; Winslow v. Merchants' Ins. Co., 4 Met. 306; Hamilton v. Rogers, 8 Md. 301; Wilson v. Wilson, 37 Md. 1; Pettis v. Kellog, 7 Cush. 456; Barnard v. Eaton, 2 Cush. 294; Codman v. Needham, 3 Cush. 306; Chapin v. Crane, 40 Me. 56; Low v. Pew, 108 Mass. 347; Carpenter v. Simmons, 1 Rob. (N. Y.) 360; Yates v. Olmstead, 65 Barb. 43; Mitnacht v. Kelly, 3 Abb. (N. Y.) App. 301; Single v. Phelps, 20 Wis. 398; Farmers, etc. Co., v. Commercial Bank, 11 Wis. 207; Chisholm v. Chittenden, 45 Ga. 213 Lunn v. Thornton, 1 C. B. 385; Moody v. Wright, Met. 7; and many other cases which may be found by reference to Herman on Chattel Mortgages, 89.

[6] Wright v. Bircher, St. Louis Court of Appeals 1877—6 Cent. L. J. 197.

[7] People v. Bristol, 35 Mich. 28; American Cigar v. Foster, 36 Mich. 368; Caldwell v. Pray, 9 Cent. L. J. 199, decided June Term, 1879.

continuance of the security, be brought into the premises, either in addition to or in substitution for the stock-in-trade, goods, chattels and effects therein at the time of the making of the bill of sale. *Held*, by Lopes, J., that the property in the stock-in-trade brought upon the premises subsequently to making the bill of sale, passed by it to the grantee.[8] The above was an ably-argued case, and decided after mature consideration.

The following is a very striking case and demands careful consideration, on the validity of liens upon personal property to be afterwards acquired. Bircher was the owner of a six-story building in St. Louis, adjoining the Laclede Hotel, and on February 7, 1873, while work was in progress to convert it into a hotel, leased it to John W. and Walter Malin, to be used by them, when completed, as a hotel. At that date, there were no fixtures or furniture in the building, but they were to be put in thereafter by the Malins, and were actually placed in the building in July, 1873. The term of the lease was ten years, commencing on the — of ———, 187–, the annual rent received being $32,000, payable in monthly payments of $2,660.66, on the last day of each month. The lease contained this provision: "All fixtures, furniture and other improvements shall be bound for the rent and fulfillment of other covenants herein contained on the part of the lessees." And any forfeiture for non-fulfillment of conditions therein, might be enforced at any day or time, however distant, after such failure or default should happen. The concluding stipulation was: "This lease shall commence on the first of the month after the completion of said building, and the blanks shall be filled that day. It is further agreed that connections can be made with the Laclede Hotel." The building was completed August 1, 1873, and the blanks in the lease filled as of date, and the lease duly recorded. In the meantime, the fixtures and furniture in question were placed in the building. February 9, 1874, the Malins borrowed $25,000 of Nannie M. Wright, and gave her a deed of trust on all the personal property in the Laclede-Bircher Hotel, the name of the combined buildings, to secure it. May 26, 1875, she loaned them $10,000 additional, and took a deed of trust on the same property. She took these deeds with actual notice of the stipulations of the lease. Bircher entered and took possession of the property in the Bircher building, claiming a lien under the lease for rent in arrears, which was resisted by Nannie M. Wright on the ground that Bircher's lease failed to create a lien on the goods in law or equity. The judgment of the circuit court was in Bircher's favor, which was affirmed by the court of appeals. *Held*, upon an exhaustive review of the conflicting cases on the subject, that, on the facts stated, the stipulations of Bircher's lease gave him a valid lien on the property subsequently put into his building, which he was entitled to have enforced as a prior lien as against the deeds of trust for the benefit of Nannie M. Wright, taken with notice of such prior lien.[9] A chattel mortgage on a stock of goods and fixtures, which provides that the mortgagor may retain possesion of the goods and sell them in the ordinary course of trade, using a portion of the proceeds realized for paying expenses and replenishing the stock, and accounting to the mortgagees for the residue, is valid and binding as to the fixtures, at least, and as to the rest of the goods, fraud will not be presumed; but the question of validity depends upon extrinsic facts, outside of the recitals in the mortgage itself.[10]

A chattel mortgage may be made to include future acquisitions of goods to be added to the original stock of goods mortgaged, but the mortgage must expressly provide that such future acquisitions shall be held as included in the mortgage; so, where the mortgage recites that it also schedules and describes the mortgaged goods, the provision that the mortgagor shall keep up the stock of goods, is not sufficient to extend the terms of the mortgage or create an inference of what was intended.[11]

We made reference in the beginning of this article, to the case of Brackett v. Harvey, decided by the New York Court of Appeals in 1883. While it has been shown that a large majority of decisions in England and the United States differ from this decision, yet

[8] Lazarus v. Andrews, Eng. High Ct., C.P. Div. 43; 11 Cent. L. J. 336.

[9] Wright v. Bircher, S. C. Mo., 1880, cited in 12 Cent. L. J. 44.—Opinion by Henry J.

[10] Lockwood v. Harding, S. C. Ind., Feb., 1882; 14 Cent. L. J. 158.

[11] Phillips v. Both, S. C. Iowa, June, 1882, 12 N. W. Rep. 481, cited in 15 Cent. L. J. 17.

there are many cases of the highest courts by which it has been sustained, and the principle appears a sound one, when no fraud is either apparent, or can be suggested or proven from the history of the case or the circumstances. Finch, J., delivered the opinion of the court, and argues the case with fairness, ability and learning. He does not refer to the abundant authorities on each side of the case, nor review them. He refers to the cases Ford v. Williams,[12] Conkling v. Kelley,[13] Miller v. Lockwood.[14] He remarks, "These cases went upon the ground that such sale and application of proceeds is the normal and proper purpose of a chattel mortgage and within the precise boundaries of its lawful operation and effect. It does no more than to substitute the mortgagor as the agent of the mortgagee to do exactly what the latter had a right to do, and what it was his privilege and duty to accomplish. It devotes, as it should, the mortgaged property to the payment of the mortgage debt, and the further doctrine of one of these cases, that under such a stipulation the proceeds, realized by the agent, are to be deemed realized by the principal, and as against an adverse lien, are to be applied on the mortgage debt even though not actually paid over,[15] shows how impossible it is that any fraud, or injury to others, can be imputed to the agreement." [16]

The opinion of the court in the above case refers to the opinion of the same court in a recent case of Southard v. Benner,[17] as not being in conflict with the opinion in the case of Brackett v. Harvey.

The application of the proceeds of a mortgage by the mortgagor, may from its face, purport fraud. It was held, a chattel mortgage permitting the mortgagor to remain in possession, and to sell and apply the proceeds, or any part of them, to his own use, is fraudulent and void in law as against creditors.[18]

The point involved in the case cited above, and many of the cases referred to in the note, involves fraud on other creditors, if no fraud exist, however, there are many decisions making such mortgage *de facto* void.

This very interesting and important question has been so extensively discussed in England and the United States, and with so many conflicting decisions, we deem it expedient to call the attention of the profession to a decision made by the Supreme Court of the United States at the October term, 1874, in the case of Robinson v. Elliott.[19] This case, which arose under the Statute of Frauds, in Indiana, presents the law on this subject with so much fairness, and the opinion delivered by Mr. Justice Davis, being one of such learning and ability, it should be authoritative in every State, unless otherwise controlled by statute.

The Statute of Frauds in Indiana, enacts:

Section 10. "That no assignment of goods by way of mortgage, shall be valid against any other person than the person thereto, when such goods are not delivered to the mortgagee, or assignee, and retained by him, unless such assignment or mortgage shall be duly recorded." And in,

Section 21. "That the question of fraudulent intent in all cases, shall be deemed a question of fact."

Held, "A mortgagor of chattel personal may, if the transaction be fair and the mortgage made by him be duly recorded, retain possession of personal chattel."

"But the effect of the statute is not to make every recorded mortgage, which, prior to the statute would have been held fraudulent in law, *prima facie* valid."

"The recording of the mortgage contemplated by the statute was meant as a substitute for possession, but was not meant to protect a mortgage from all illegal stipulation contained in it."

From the face of the mortgage it further appeared. "And it is hereby expressly agreed, that until default shall be made in the payment of some one of said notes, or some paper in renewal thereof, the parties of the first part may remain in possession of said goods, wares and merchandise, and may sell the same as heretofore, and supply their places with other goods, and the goods substituted by purchase for those sold shall, upon being put into said

[12] 24 N. Y. 369.
[13] 28 N. Y. 360.
[14] 32 N. Y. 293.
[15] Conkling v. Kelly, *supra*.
[16] Cited from 17 Cent. L. J. 113.
[17] 72 N. Y. 424.
[18] Blakeslee v. Bossman, S. C. Wisconsin, in 1878, 6 Cent. L. J. 289; Place v. Longworthy, 13 Wis. 629; Steinart v. Denster, 23 Wis. 136; Herman on Chattel Mortgage, 224, 240, where he cites a large number of cases.

[19] 22 Wallace 513.

store, or any other store in said city where the same may be put for sale by said parties of the first part, be subject to the lien of this mortgage."

"The instrument then concluding with power to the mortgagor upon any default to have the right to enter into said store of the firm and take possession of a sufficient amount of goods to satisfy, pay and discharge all paper due, and have full power and authority, upon ten days public notice, to sell at public auction such amount of said goods as should be necessary to pay said paper."

Held. 1. "That the court was the proper party to say whether, on its face the mortgage was void. 2. That it was void."

This second head note involves the great question connected with the legality of such mortgages. The Indiana statute was copied from 13 Elizabeth, which was recognized in most of the States.

The justice in delivering the opinion of the court in this case says: "If chattel mortgages were formerly, in most of the States, treated as invallid, unless actual possession was surrendered to the mortgagee, it is not so now for modern legislation has, as a general thing, (the cases to the contrary being exceptional) conceded the right to the mortgagor to retain possession if the transaction is on good consideration and *bona fide*. This concession is in obedience to the wants of trade, which deem it beneficial to the community that the owners of personal property should be able to make *bona fide* mortgages of it, to secure creditors, without any actual change of possession. But the creditor must take care in making his contract that it does not contain provisions of no advantage to him but which benefit the debtor, and were designed to do so, and are injurious to other creditors."

The court further remarked: "If the mortgagee goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor so that creditors are delayed in the collection of their debt, a court of equity will not lend its aid to enforce the contract."

In reference to the disposition of the property by mortgagor the court draws a very striking distinction which made the mortgage in the present instance *prima facie* void, without involving, under other circumstances, any feature of fraud, it was in the language of the court thus: "But there are features engrafted on this mortgage which are not only to the prejudice of creditors, but which show that other consideration than the security of the mortgagee, or their accommodation ever entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagee, nor any recognition that the property is sold for their benefit."

This was the substantial point in the case, here was *prima facie* fraud, the mortgage created no lien and was therefore no security.

This decision does not conflict with the principle recognized in other cases not cited that the mortgagor may retain possession of the chattels, sell the same and invests in other goods to be considered subject to the mortgage for the benefit of the mortgagee.

There is, if not made otherwise by statute, no conflict on legal or equitable principle in the case of Brackett v. Harvey, and the case of Robinson v. Elliott. The latter case makes a very clear and explicit reference to the case of Southard v. Benner, decided by the same court, which case recognizes the point of apparent fraud in that case, as in Robinson v. Elliott, where the mortgagors, not only retained possession of the chattels, but were allowed to sell them, and appropriate the proceeds of the sale to their individual and family support.

We may safely conclude that the case of Brackett v. Harvey, is not only in accord with the principle of modern decisions on this subject, but that it is sound in law and equity and being among the most recent, may on account of the learning and ability manifested in the opinion of the court be considered a leading case.

WM. ARCHER COCKE.

Florida.

LIABILITY FOR OVERHOLDING BY UNDER-TENANTS.

In the contemporaneous cases of London, etc. Ry. Co. v. Hill, and Winans v. Mackenzie, overholding by sub-tenants and under-occupants, has recently given rise to contention, both in this country and in Scotland.

According to our law, where there is a demise of premises, the tenant is impliedly, if not expressly, bound to deliver up possession on the expiration of his term, and therefore, if his under tenants refuse to quit, he will be liable to his landlord for their overholding, as well as for the costs the landlord may incur in obtaining the clear possession.[1] So, if the landlord lets the premises in reversion to another, and has to pay damages by reason of having been thus prevented from giving possession, the tenant is liable for damages and costs.[2] And in a recent American case we find it held that a lessee can not have his lease set aside and be released from his covenants to pay rent, from the mere fact that a prior tenant, whose term has expired, holds over without right; the lessee, having the right of possession, should take legal steps to obtain possession against such prior tenant.[3] Where premises are let to two persons, one of whom, at the end of the term, holds over with the assent of the other, both will be liable for the time during which the one holds over.[4] But, while answerable for the act of his own undertenant, a tenant will not be liable to the rent incurred by the overholding of his co-tenant, if done without his consent, and if he has himself quitted the premises.[5]

Now, in London, etc. Ry. Co. v. Hill,[6] it appeared that John Hill had been tenant from year to year to the plaintiffs, and sublet a portion of the premises to a sub-tenant. John Hill died in October, 1879, and the defendant, his widow, having taken out administration to him, went into possession of the premises, subject to the sub-tenancy. The plaintiffs, having served a notice to quit, which expired on the 1st of February, 1880, demanded possession. The defendant was unable to give up possession of the sublet portion of the premises, as the sub-tenant refused to leave, his term not having expired, but she offered possession of the remainder, which the plaintiffs declined to accept, and the defendant thereupon, on the expiry of the notice to quit abandoned the premises. Possession was subsequently recovered by the plaintiffs, in an action of ejectment against the defendant and the sub-tenant. Thereupon the plaintiffs brought an action against the defendant to recover damages, including the costs of the ejectment, treating her as personally liable as a trespasser and wrong-doer, claiming substantially in the form used in actions of trespass for mesne rates, and not proceeding against her for use and occupation. The defense was based on the fact that the defendant assumed possession solely and properly in her administrative capacity; and, the plaintiffs having demurred, the question was whether the administratrix was liable in the same manner as the intestate himself would have been liable, by reason of the overholding of the sub-tenant. Clearly, he would have been liable for the damages arising from his landlord being kept out of possession and being put to the costs of an ejectment, on the authorities cited; and no doubt, as May, C. J., remarked, "if a tenant creates a sub-tenancy, which occasions loss and damage to his landlord, it seems perfectly just that he should be responsible for such consequences." And if the action had been brought against the defendant as administratrix, in order to recover damages out of the assets, the case would have worn another aspect. But then, the case of Henderson v. Squire,[7] was pressed, as supporting the plaintiffs' right to recover. "It is to be observed," said Johnson, J., "that in that case the first count was in trespass for mesne rates, the second for breach of contract to give up possession; to the first count the defendant pleaded not guilty, but to the second count, payment into court of 40*s*. The plaintiff proceeded for damages *ultra* this 40*s*., and at the trial a verdict was directed for the defendant, with leave to the plaintiff to move to enter the verdict on the second, or contract count be it observed, for the increased damage proved at the trial; and accordingly, after argument, the verdict was entered for the increased damage, on the contract count, pursuant to the leave reserved." In the present case, he added, "the way in which this action is framed is matter of substance, not of form, and if the defendant was sued for breach of

[1] Henderson v. Squire, L. R. 4 Q. B. 170; 38 L. J. Q. B. 73; Ibbs v. Richardson, 9 A. & E. 849; 1 Per. & Dav. 618; Harding v. Crethorn, 1 Esp. 57; 23 & 24 Vic., c. 154, s. 42.

[2] Bramley v. Chesterton, 2 C. B. N. S. 592; 27 L. J. C. P. 23.

[3] Field v. Herrick, 101 Ill. 110.

[4] Christy v. Tancred, 7 M. & W. 127; 9 Id. 438; Tancred v. Christy, 12 Id. 316.

[5] Draper v. Crofts, 15 M. & W. 166.

[6] Q. B. D., May 16, 1883.

[7] *Ubi supra.*

contract, her responsibility would be entirely different from that for a trespass by herself." Now, no doubt, if an administrator enter upon demised premises after the tenant's death, he may be treated as assignee in fact, and sued for damages *de bonis propriis*, but, while responsible, if sued in his representative capacity, and so far as regards assets in his hands, for any liability incurred by the deceased,[8] the law, said May, C. J., "does not deal unjustly with a representative who acts in a fiduciary relation, and will render him personally liable only to the extent of the value of the premises upon which he has entered. And here, it may be added, the statement of defense contained averments (though immaterial as the action was framed) of *plene administravit* and absence of assets. The defendant had not placed the sub-tenant in possession, did not encourage him to retain it received no rent from him, and in fact was in no privity whatever with him; while she herself had abandoned possession of the premises from the moment when the plaintiffs acquired a right to it, and had derived no profit therefrom that could be recovered in an action for mesne rates. And under such circumstances it was held, disallowing the demurrer, that the defendant was not responsible.

In the Scottish case of Winans v. Mackenzie,[9] which excited a great deal of even more than local interest, the question involved depended on a very different state of circumstances, and was certainly of extreme importance; but, without troubling our readers with a dicussion on the technicalities of a system of procedure so different from ours in many respects, it will suffice briefly to note here the general result of the decision. It appeared that, in a lease of an estate which it was intended that the tenant should convert into a deer forest, and it was stipulated that the landlord should by a certain date remove his sheep stock off a certain part of the ground, "and the shepherds and other occupants from the buildings occupied in connection with the ground." After entering upon possession the tenant brought an action to have the landlord ordained to implement the terms of the lease by giving him possession of the buildings on this ground free from the occupation or possession of the landlord's "manager, keeper, servants, and other dependents, and other occupants." The defender averred that he was willing to remove the shepherds, after such legal warning as, being according to the custom of the district yearly tenants of their employer, they were entitled to, and that he had been unable to warn them to remove sooner in consequence of the actings of the pursuer himself. With regard to the other persons occupying houses on the estate, he averred that they were cottars, each occupying a house and piece of land under a customary tenure peculiar to the district, and were not his dependents or servants, that it was not the intention of parties at the time of the lease that they should be removed, and that he had no right to remove them. It was held that, assuming the obligation to remove the cottars to exist, it was not one which could be enforced against the defender by specific implement (especially in an action to which the cottars were not parties) since it was not clear that such implement could be given without breach of the cottars' rights, and that decree *ad factum præstandum* being therefore inappropriate, the pursuer's remedy, if any, must be by way of action of damages. As was observed by the Lord Chancellor, in another recent case in the House of Lords (July 26, 1882), "In Scotland the legal and equitable jurisdiction have always been united, and the natural result of that unison is that strict legal rights ought not to be enforced without regard to the discretion which, from the nature of the subject-matter and the interests of all concerned in it, ought to be exercised by a court of equity."[10]—*Irish Law Times.*

[8] Rubery v. Stevens, 4 B. & Ad. 245.
[9] June 8, 1883, 20 Scot. L. Rep. 640.
[10] Graham v. Swan, 9 R. 91.

CONVEYANCE—CLOUD UPON TITLE—EQUITY.

WEST PORTLAND HOMESTEAD ASSOCIATION v. LOWNSDALE.

United States Circuit Court, District of Oregon, August 21, 1883.

1. In 1871 sundry persons who were owners in common of a tract of land, laid out thereon a Carter's addition to Portland and partitioned the same among themselves by deed, designating therein the blocks and lots allotted to each, among which was block 67, allotted to Charles M. Carter; the deed of partition

was recorded but the plat was not. Shortly, after L. F. Grover and wife, who were parties to this partition deed, laid out an addition to this Carter's addition on a tract of land belonging to said wife, and lying immediately south of said first survey and numbered one of the blocks therein 67—said Charles M. Carter having in the meantime changed the designation of the first block 67 to that of Park block, and set it apart for public use as such, and thereupon the parties to both surveys united in executing a common plat of them as Carter's addition to Portland, in which the first block 67 was designated as a park block and the second one by that number. In 1874, Grover and wife conveyed block 67 in the second survey to the plaintiff, and on February 19, 1878, the defendant was appointed by this court assignee in bankruptcy of the estate of said Carter, and within less than a year before the commencement of this suit set up a claim to the property, as such assignee, under the deed to Carter, and was proceeding to sell the same. The bankrupt never claimed the property, and the plaintiff and his grantors have always paid the taxes thereon. *Held*, 1. That it was a case of latent ambiguity in the deed to Carter arising out of the subsequent circumstances, which the plaintiff was entitled to explain, by showing that it was not the intention of the parties thereto to convey the second block 67, and that it appeared from the facts that the plaintiff had the legal title to the property, and was not precluded by the circumstances from asserting it in this suit. 2. That the defendant, under the circumstances, has color of title to the property, and if he were allowed to sell it he would thereby cast a cloud upon the plaintiff's title, and therefore equity will restrain him by injunction from so doing. 3. That if sec. 5057 of the Rev. Stats. is applicable to the case, this suit is not barred by it, because it is only brought to prevent the threatened wrongful sale, and therefore the right to sue did not accrue until the defendant undertook to sell the premises, and did some act in pursuance of such promise.

C. P. Heald, for the plaintiff; *Geo. H. Williams*, for the defendant.

DEADY, Circuit Judge, delivered the opinion of the court:

This suit was commenced on March 27, 1883, and on July 20th the court sustained a plea to the bill of the limitation contained in sec. 2 of the bankrupt act (sec. 5057 Rev. Stats.).

It has since been heard and submitted on a demurrer to an amended bill filed July 24th, which presents the case in quite a different aspect.

The plaintiff is a corporation formed and existing under the laws of Oregon, and brings this suit to restrain the defendant, as assignee of Charles M. Carter, from selling block 67 in Carter's addition to Portland, as the property of the bankrupt.

It appears from the amended bill that on and prior to September 7, 1871, Joseph S. Smith, Charles M. Carter, T. J. Carter and L. F. Grover were the owners in common of the then unsold portion of the donation of Thomas and Minerva Carter, in township 1 south of range 1, east of the Willamet meridian, the same being bounded on the south by the east and west subdivision line of sec. 4 of said township, and as such owners, in August, 1871, surveyed and laid out Carter's addition to Portland thereon, and designated the blocks, lots and streets thereof by numbers and names on the plat that they then executed and acknowledged, but did not record, and by deed duly recorded then partitioned the premises among themselves, designating therein according to said plat, the lots and blocks allotted to each; that on said plat there was a block designated 67, and the same was conveyed by the deed so executed to Charles M. Carter as "block 67 in Carter's addition to Portland," but said survey and plat was afterwards so changed "by said Carter and others" that the said block has ever since been known as a park, and not as block 67; that at the time of said partition said parties had no interest in any land south of said east and west subdivision line, and there was no other plat in existence than the one aforesaid, to which they could have referred in the execution of said partition deed; that in October, 1871, said Grover and Elizabeth, his wife, caused a certain tract of land, belonging to said Elizabeth and adjoining the aforesaid tract on the south, to be surveyed and mapped into blocks, lots and streets, and designated by numbers and names as a part of Carter's addition to Portland, among which was a block numbered 67; that afterwards said Grover and wife, together with the parties to the said partition, made a general plat of both said additions to Portland, and duly executed the same and caused it to be recorded on November 4, 1871; that the block designated as 67 in the first survey is marked on said plat as a park, while the block now known and designated thereon as number 67 is the one surveyed and mapped by Grover and wife on her land subsequently to the making of said partition deed to Charles M. Carter, and was not in existence as such at the date thereof.

It is also alleged in the bill that said Grover block 67 was no part of the consideration in or for said partition, nor was it the intention of the parties thereto to refer to it or comprehend it therein, but that the block numbered 67 in the deed to Carter was another parcel of land included in the tract owned in common by said parties, and not the parcel now known as block 67 in Carter's addition to Portland; and "that it is by accident" that the description of the block conveyed to Carter answers to that now known as block 67 in said addition.

On August 11, 1875, said Grover and wife, for a valuable consideration, conveyed the block now known as 67 to the plaintiff by a deed which was recorded, and it is alleged that the plaintiff in obtaining such conveyance acted in good faith; that at the date of such conveyance, and prior to the one to Charles M. Carter, said Grover and wife were in the exclusive possession of said block and paid the taxes thereon, and since said conveyance to the plaintiff it has been and now is in the like possession and has paid the taxes thereon; that said Carter never was in possession of the premises nor ever paid any taxes thereon or claimed any title or interest therein or contracted any debt upon the faith of such title or interest, and that no judgment creditor of said Carter was deceived

by the fact that block 67 was contained in the deed to him; and that Grover and wife when they gave the number 67 to the block in question acted in good faith, relying upon the records of the county and the understanding that such designation, as applied to the parcel of land first numbered 67 had been abandoned.

The bill further alleges that the defendant, as assignee aforesaid, and by reason of the premises now claims to be the owner of the block in question, and is about to sell the same at public auction, and will do so unless restrained by this court, and will thereby cast a cloud upon the plaintiff's title thereto, to its manifest wrong and injury; that the defendant never set up any claim to the block in question, to the knowledge of the plaintiff, prior to the publication of the advertisement giving notice that he would sell the same on March 28, 1883.

The causes of demurrer are: 1, the suit is barred by sec. 5057 of the Revised Statutes; 2, the plaintiff is chargeable with notice of the deed to Carter prior to the execution of the one to it; 3, the allegations as to the discovery of the plaintiff's right of suit are uncertain and insufficient; 4, there was no accident or mistake in the execution of the deed to Carter; 5, the parties to the deed to Carter mutually abandoned the first block 67, and dedicated it to public uses and substituted the second block 67 therefor; and, 6, there is no equity in the bill.

The identity of block 67 in Carter's addition is affected by this state of things, but the apparent confusion is neither the result of accident nor mistake. On the contrary,the separate acts which, taken together, have caused this ambiguity were deliberately intended by the parties, acting upon a correct conception of the facts pertaining to each, but apparently without consideration for or attention to their collaterals or incidental effect.

An accident is an unforseen or unexpected event, of which the party's own conduct is not the proximate cause. Pom. Eq. Jur., sec. 823. But the designation of the Grover block 67 by the plaintiff's grantors while their deed was on record to another block 67 in a Carter's addition was the immediate cause of this confusion.

A mistake is an erroneous mental conception that influences the will and leads to action. Pom. Eq. Jur., sec. 839. But the Grover block was designated 67, upon the impression, as was the fact, that a similar designation of a block in the first survey had been abandoned, and that parcel of land set apart as a park; and the conveyance of said block to Carter as block 67 was made and accepted under the impression, as was also the fact that there was then a block of that number in the first survey, and not elsewhere.

But if the parties, at the time of the execution and filing of the final plat of Carter's addition, were not aware or did not notice that the designation of this block thereon, under the circumstances, as block 67, might produce confusion of identy and lead to a conflict of claims concerning the same, they may be said to have made a mistake, but only such a mistake as arises from that inattention to known or knowable facts and their consequences as constitute negligence. Against such a mistake equity affords no relief. Pom. Eq. Jur., sec. 839. Neither is there any doubt that upon the facts stated, the plaintiff is the owner of the block in question and has the legal title thereto. The conveyance to Carter of block 67 in the first survey did not affect the title to block 67 in the second survey—and would not even if the second 67 had been then in existence. It was this block that was conveyed to Carter, and not the number 67, wherever else it might be used or applied. This block was a particular parcel of ground, then designated 67, within the limits of the first survey and not elsewhere.

The bill distinctly alleges that such was the intention and understanding of the parties to the conveyance, and the fact that the block 67 in the second survey was not then in existence, is itself satisfactory evidence of that fact. The claim that the parties substituted block 67 in the second survey for the one of that number in the first survey, is not supported by the facts. Nothing of the kind is alleged in the bill, nor do the facts stated therein warrant any such inference. On the contrary, it appears that the first 67 was changed to a park block before the other was surveyed or designated; and that upon the final plat of Carter's addition, which was made up from the previous surveys of the two tracts, the first one was accordingly designated as a park block and formally dedicated to public use, while the latter was designated as private block 67.

But the making and recording of this plat did not operate to convey any block therein to Carter. That might have been done by marking the same on the plat as a donation or grant to him. Or. Laws, p. 777, sec. 3. And the very fact that this was not done is evidence, under the circumstances, that it was not within the contemplation of the parties. Nor does it appear probable that Mrs. Grover would surrender a block of her land to Carter in consideration of a dedication by him of another block to a public use, that was as of much or more benefit to the rest of the parties to the plat than to her.

And if there ever was any agreement or understanding between the parties, short of a legal conveyance, that in consideration of the dedication by Carter to a public use, of the first block 67, he should receive the second block 67, it did not affect the legal title to said second block. And if it is sufficient to raise an equity in favor of Carter, that the defendant can assert here, the burden is upon him to allege and prove it.

Neither is the plaintiff estopped to assert its right to the premises. True, it took the conveyance from Grover and wife with notice of the prior conveyance to Carter, and it is also true that the latter deed appeared to convey block 67 in Carter's addition, and this was the only block on the plat that answered that description. But

it was no farther affected by the notice of this deed, than were the grantors therein by the deed itself; and if they could show, as certainly they could, that the block described therein as 67, was not this 67 but another, so can the plaintiff. Besides, the deed to Carter also showed upon its face that it was executed before this plat was, and therefore there was no ground for the inference that the former referred to the latter, or that the 67 mentioned in the one was the 67 mentioned in the other.

Upon the whole, this is simply a case of latent ambiguity in the deed to Carter, concerning the subject-matter of the conveyance, produced by circumstances subsequent, as well as collateral to the deed. In such a case, it is always competent to show by evidence *dehors* the deed, the actual intention, in this respect, of the parties thereto. 1 Greenl. Ev., sec. 297; 2 Whart. Ev., secs. 956-7; Piper v. True, 36 Cal. 614.

The effect of this ambiguity is to give the defendant, as assignee of Carter, color of title to the premises, under which, it appears, he will, if not restrained by this court, sell the same and thereby cast a cloud upon the title of the plaintiff. For it seems that although the second block 67 was a part of the separate property of Mrs. Grover, and therefore could not even appear to be affected by her husband's conveyance of the first block 67, that she signed the deed with her husband and his co-tenants conveying the first 67 to Carter, so that upon the record Carter appears to have received the elder conveyance from Grover and wife to block 67.

That a sale of this property, under these circumstances, by the assignee, would cast a cloud over the title of the plaintiff, and that therefore the court has power by injunction to prevent such sale, is a proposition well supported by the authorities. Pixley v. Huggins, 15 Cal. 132; Coulson v. Portland, 1 Deady, 487; Ewing v. St. Louis, 5 Wall. 418; Lick v. Ray, 43 Cal. 88; High on Injunction, secs. 269-272.

The test of what is a cloud on title is shortly stated by Mr. Justice Field, in Pixley v. Huggins, *supra*, as follows: "Every deed from the same source through which the plaintiff derives his real property, must, if valid on its face, necessarily have the effect of casting such cloud upon the title."

The plaintiff is clearly entitled to the relief sought, unless the suit is barred by lapse of time. It is the real owner of property. Carter never had any interest in it, nor made any claim to it. By reason of circumstances occurring after the conveyance to him, he came to have color of title to the premises, but nothing more. Nor is there any special ground on which his assignee, as the representative of his creditors, can make any better claim to the property than he could. No one of them, so far as appears, stands in any such relation to the property as a purchaser in good faith, and for a valuable consideration; and if he does, it is not perceived on what ground he could assert any right thereto, as against the true owner, unless it be an estoppel by conduct arising out of the fact of the plaintiff's grantors executing and allowing a plat of Carter's addition to go upon the record with a block designated thereon as 67, when they knew, or may be presumed to have known, that a prior deed of theirs to Carter for a block with a similar designation, in what purported to be Carter's addition, was already on record. But even then the fact that the deed was prior in point of time to the plat, and could not therefore be supposed to refer to it, may be a sufficient answer to this suggestion.

Neither is the right of the plaintiff to maintain this suit barred by lapse of time. Section 5057 of the revised statutes enacts: "No suit either at law or in equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

But it is not clear to my mind that this case falls within this section. This is not a suit to establish or annul an adverse claim to this property, but a suit to prevent the doing of act concerning the same which, under the circumstances, will cast a cloud upon the plaintiff's title. It is a suit to prevent the defendant from committing a threatened wrong. True, the right to maintain it rests upon the ownership of the plaintiff, and the threat to do the alleged wrong proceeds from a claim of ownership in the defendant which is adverse to that of the plaintiff.

Suppose, however, the assignee commits a trespass upon premises in the apparent ownership and possession of the plaintiff, as by entering thereon, and cutting and carrying away growing timber or grain; and suppose such entry is made in pursuance of a claim of ownership or interest adverse to the plaintiff, does this section apply to an action to recover damages therefor? I think not; and that the section is confined in its operation to cases where the suit is brought directly to establish or annul an adverse claim in the property vested in the assignee, or to recover the possession of that to which he is entitled as the representative of the creditors of the bankrupt. But suppose the section does apply, within what time must an action for the trespass be brought? In two years from the date of the adverse claim, or the circumstance out of which it is alleged to arise or the commission of the trepass? Certainly within the latter period. Any other construction would involve the absurdity of a cause of action being barred by lapse of time before it arose.

So in this case. Admitting that it falls within the section, when did the cause of suit accrue?

At the time the circumstances occurred which gave Carter the color of title to this property, on the strength of which his assignee is now threatening to commit the wrong complained of, or from the time when the proceeding for the sale was

commenced or first came to the knowledge of the plaintiff? In my judgment there can be but one answer to this question.

As I have said, this is a suit to prevent a wrongful sale of the premises which will have the effect to cast a cloud upon the plaintiff's title, and the right to maintain it could not have accrued until something was done by the defendant to manifest his intention or purpose to make such sale. The mere fact that the assignee had the same show of right to make this sale five years ago, as now, is not material. He never had the legal right to sell and the plaintiff could not have maintained a suit to enjoin him from doing an illegal act that he had not attempted, and for aught that appeared, never would.

If this was a suit to annul or set aside the deed to Carter, so far as block 67 is concerned, upon the ground that it constituted a cloud on the plaintiff's title to the existing block 67, the statute if applicable, would doubtless be a bar to the relief sought. But this suit goes no further back than the wrongful attempt of the defendant to sell and is limited in its object to the prevention of that wrong.

The case of Bailey v. Glover, 21 Wall., 346, is not in point. That was a suit by the assignee to set aside a fraudulent conveyance by the bankrupt, and of course the cause of action—the right to have such conveyance set aside, accrued as soon as it was made. The conveyance passed the title, subject to the right of the creditors to have it set aside for fraud, and the interest of the grantee therein was adverse to the creditors from the date of the transaction, and would by lapse of time ripen into an absolute estate in the premises. *In re* Estes, 6 Saw. 460. The demurrer is overruled.

EMINENT DOMAIN — NAVIGABLE RIVERS —RIPARIAN RIGHTS—FEDERAL COURTS —JURISDICTION.

VAN DOLSEN v. MAYOR OF NEW YORK.

United States Circuit Court, Southern District of New York, August 30, 1883.

The plaintiff's lessors owned property in New York city fronting on the East river—a navigable river. The city of New York, under authority of grants from and laws of the State of New York, was about to fill into the water and make a new water front in front of plaintiff's land. This would have cut plaintiff off from access to the navigable river. A preliminary injunction was granted. Plaintiff's lease expired before final hearing. Plaintiff's lessors were citizens of New York, though he was not. *Held*, 1. The lease not being a sham, the Federal court had jurisdiction. 2. The plaintiff, as a riparian owner, was entitled to have the river flow by his land as it flowed by nature, and was entitled to access from his land to the navigable water, and from the latter to his land. 3. This right was property, of which he could not be deprived without compensation. 4. The State was not competent by any sort of le is ation to authorize the destruction of plaintiff's water front for any purpose, except in the exercise of the right of eminent domain, and on compensation made. 5. Plaintiff's lease having expired before final hearing, the injunction could not be continued, but he was entitled to recover damages for the injury he sustained.

James W. Gerard, for plaintiff; *James C. Carter*, for the city.

WHEELER, Circuit Judge, delivered the opinion of the court:

This cause has been heard upon pleadings, from which it appears that while the whole proprietary interest in all the land and water now in question was vested in the British crown, Sir Edmund Andross, Royal Governor of the province of New York, granted, in 1676, to Gabriell Curtessee, a tract of land on the east side of Manhattan Island, bounded southeast by the river, and, in 1677, to David Deffore, another tract adjoining this, bounded "by ye water side." These lands between now Forty-ninth and Fifty-first streets, on the water front, on which there has been and been used for many years a landing place, are the property of Gerard and James W. Beekman, who leased the front to the orator for two years from November 11, 1880. The defendants are attempting, under authority of grants from and laws of the State of New York, to fill into the water and build a new water front before this landing place, and cut it off from the water. This bill is brought to restrain such action and for an account of damages. The owners have been accustomed to lease these premises for dock purposes before. They apprehended such action as has been begun by the defendants, and a controlling reason for making this lease was the fact that the orator is a citizen of another State, and could, as was supposed, proceed against the defendants in this court for any interference with his rights.

It is objected that this controversy is really between the lessors and the defendants, who are citizens of the same State, and not between the orator and the defendants, and that therefore the suit does not really involve a controversy properly within the jurisdiction of this court, and should be proceeded with no further, but dismissed, under sec. 5, act of 1875, 1 Sup. Rev. Stat. 175. If the lease was real and not fictitious the wrong, if any, during the term, would be to the orator and not to the lessors. Nothing is involved now except what occurred during that time; no right can be passed upon but his; if he has none and the lessors are merely using his name to try their rights, the suit should be dismissed under the provisions of that act.

It would not seem that the fact that he acted in view of the remedies afforded him by the laws of the land, and of all remedies under all the laws, could deprive him of any of the benefits or remedies of any of the laws of either jurisdiction. McDonald v. Smalley, 1 Pet. 620. The question in a case like this seems to be the same as before the act, and to be, as stated by Chief Justice Marshall in that case, whether the trans-

action was real or fictitious, although dismissing the bill without proceeding further may be more summary. Upon this question the evidence, although full as to the motive, is that the lease was real, or at most does not show that it was not real and effectual to pass the title of the term to the orator. There is therefore no good ground apparent for dismissing the orator's case without passing upon his rights involved in it.

The original grants are shown by entries and are not set forth at large, and there are several breaks in the chain of title, in the public records; but the chain is perfect since very ancient times, and references are made from subsequent to prior grants, and from thence to the original grants, so as to be traceable throughout, and in connection with peaceable possession shown beyond memory, the title from the Crown through the grant of the royal governor down to the water, satisfactorily appears. Kingston v. Horner, Cowp. 102; Johnston v. Ireland, 11 East, 280; Read v. Brookman, 3 T. R. 159; Fletcher v. Peck, 6 Cranch. 97; 1 Greenl. Ev., sec. 45. The defendants, the Mayor, etc. of New York, derive their title from the charter of Thomas Dougan, royal governor in 1686, granting all the lands about the Island to low water mark, reserving prior grants, made within twenty years, and from subsequent grants from the Crown and State, extending further out under water. The rights of the Crown at the Revolution became vested in the State. Martin v. Waddell, 16 Pet. 367. Thus what was granted to Curttessee and Deffore in 1676 and 1677, in respect to the front of this land, has come to the orator during his term, and what remained to the Crown after those grants, has come to the defendants.

The river by which the grant to Curtessee, and the water by the side of which the grant to Deffore, is the East river, through which the tide ebbs and flows, and which is a great highway for all people with all kinds of watercraft. The shore at this place was so steep that there was little or no difference, literally, between high and low water, and vessels could always land there without artificial docks or wharves. The owners, and others by their permission, could and did pass freely from the land on to the river, and from the river on to the land; and could always do so while the river should remain where, in the grants, it was described to be.

There is no question but that the grants stopped at high water mark, and left the right to the soil under water beyond in the Crown, subject to the right of the public to the river as a highway over it. Brac., Book 1, chap. 12; Rex v. Smith, Doug. 425; Commonwealth v. Charlestown, 1 Pick. 180; Martin v. Waddell, 16 Pet. 367. This highway was a way to this land when the successive grantees took it, and when the orator took his lease of it. So far as the defendants could have any right to it, or to the soil under it, the original grantor, the Crown, had the same right.

The Crown, after Magna Charta, could not grant land bounded on a way, and afterwards, without compensation, remove the way, any more than an individual could. The defendants, as grantees, from and under the Crown, are limited as if they had made the grant which the Crown made. They could not grant land to a way on land, and afterwards remove the way. Story v. New York Elevated Railway Co., 15 Cent. L. J. 391.

The title to the land under the way in that case came from the same source as the title to the land under this water way, and in the same manner. If the authority of the State and city was not equal to the obstruction of that way it is not apparent how they can be adequate to the total removal of this one. That is the latest decision, so for as is now known, of the highest court of the State upon the subject, and to the extent of the principles involved these must be considered to be the law of the State. The right of a land owner to enjoy the way over navigable water adjoining his land seems to have been several times fully recognized by the Supreme Court. Dutton v. Strong, 1 Black 25; Railroad Company v. Schumier, 7 Wall. 272; Yates v. Milwaukee, 10 Wall. 497. In the latter case Mr. Justice Miller expressly states the proposition to have been decided in the two former. And in delivering the opinion of the court he further says: "This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public it cannot be arbitrarily or capriciously destroyed, or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

This doctrine does not appear to have been overruled. In Weber v. Harbor Commissions, 18 Wall. 57, Mr. Justice Field, in the opinion of the court says: "It is unnecessary for the disposition of this case to question the doctrine, that a riparian proprietor whose land is bounded by a navigable stream, has the right to access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream, for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public as was held in Yates v. Milwaukee. On the contrary, we recognize the correctness of the doctrine as stated and affirmed in that case." Barney v. Keokuk, 94 U. S. 324, was an action of ejectment and involved the right of soil, and not a right of way, and what is there said appears to have been said in that view. This seems to be the English doctrine now.

Lyon v. Fishmongers Company, I. L. R. Appeal Cases 662; 35 Law T. Rep. N. S. 569. In this case the Lord Chancellor appears to have said: "I cannot entertain any doubt that the riparian owner on a navigable river in addition to the right connected with navigation to which he is entitled as one of the public, retains his right as an ordi-

nary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation;" and Lord Selborne: "For the purpose of a riparian proprietor, lateral contact with a stream is *jure naturae*, as good as vertical right. It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right."

The defendants are not proceeding to take such rights for public use upon making compensation, but are proceeding arbitrarily in denial of the existence of any such rights.

These cases and principles seem to entitle the orator to relief. There are numerous cases which standing alone, would support the claims of the defendants. Lansing v. Smith, 4 Wend. 9; Gould v. Hudson River Railroad Company, 6 N. Y. 522; Furman v. Mayor etc., 10 N. Y. 567; Stevens v. Paterson Railroad Company, 5 Vroom 532; 10 Am. Law Reg. 165. They are not considered to be controlling in view of the later cases referred to.

The orator's title has expired now, but had not at the commencement of the suit nor at the time of hearing. The delay would not take away any right to relief which he then had, although his right to continued relief might cease. He has no occasion now for the continuance of an injunction, but may be entitled to an account for damages.

Let there be a decree for the orator, accordingly, with costs.

MANDAMUS — EXECUTION OF MANDATE OF SUPREME COURT — DUTY OF INFERIOR COURT.

DUFFITT v. CROZIER.

Supreme Court of Kansas, July Term, 1883.

1. In cases decided by the Supreme Court, when the facts are found by the trial court, and a mandate is sent to that court directing it to render judgment upon the findings for the defendant below, the case is not to be retried by the district court upon the old facts; nor upon facts which ought to have been, and might have been, presented at the trial; nor is the court below, after receiving the mandate, authorized to make additional findings upon the evidence originally offered to aid or cure the judgment pronounced erroneous by the Supreme Court and ordered to be reversed.

2. The district court, upon being directed by the mandate of the Supreme Court to enter judgment on the findings of facts found by the trial court for the defendant below, in a case brought on error to the Supreme Court, must execute the mandate, unless there shall be presented new and different facts in the case.

3. Where the duty is cast upon the district court to carry out the direction of the mandate of the Supreme Court, and that duty is not performed, a *mandamus* will issue from the Supreme Court ordering the mandate to be obeyed.

Original proceedings in *mandamus*.

H. T. Green, for plaintiff; *E. Stillings*, for defendant.

HORTON, C. J., delivered the opinion of the court:

After the decision in Duffitt v. Tuhan, 28 Kan. 292, a mandate was sent to the court below, directing it to enter judgment upon the findings of fact in that case in favor of the plaintiffs in error. These parties presented in open court to the judge thereof, this mandate, and requested the court to render judgment in accordance therewith. Pending this motion, Ellen Tuhan moved the court for leave to introduce further evidence and for other findings in the case. To the hearing of this motion, Duffitt and Ramsey objected. The court overruled their objection and sustained the motion of Tuhan. Thereupon Tuhan and one J. C. Douglass were produced as witnesses. Their evidence, however, was immaterial and irrelevant. It really amounted to nothing and sustained no issue in the cause. The court then found the following fact, in addition to its facts heretofore found: "That the said R. D. Callaghan, at the time of the tax sales and deed heretofore found in this case were made, had knowledge of the making of the same, and of the record of the said tax deed, and that no proceedings were had or taken by him to annul or set aside said tax sales or deeds for more than two years after his knowledge of the taking of said tax deeds by said plaintiff to herself, nor at any other time."

The court stated as a conclusion of law on the facts hereretofore, and at said time found, that Ellen Tuhan is entitled to recover the premises mentioned in her petition. Subsequently, upon the application of Duffit and Ramsey, an alternative writ of *mandamus* was issued from this court requiring the judge of the court below to comply with the mandate issued by this court, or to show cause why he had not done so. The answer of the judge sets forth the proceedings in the district court subsequent to the filing of the mandate, and also alleges that said proceedings were done and had in accordance with the rulings and decisions of this court as understood by him, and in furtherance of justice. The question, therefore, before us is, whether, upon the record and the agreed facts, the district court must be required to enter the judgment directed by the mandate. When the case of Duffitt v. Tuhan was brought into this court by a writ of error, the whole record was brought up, and the judgment of this court, going to the merits of the case, was rendered upon the findings of fact specifically stated by the district court. Thereupon, a mandate was sent to the court below, directing it to render the judgment it should have rendered on the facts found in the case; and as no matters

arising subsequent to the decision of this court were called to the attention of the trial court when the motion was made for entering judgment upon the mandate, and as no new or additional facts were presented to that court, the duty devolved upon the court to render judgment so as to conform to the mandate. Gunter v. Laffin, 7 Cal. 588; Argenti v. San Francisco, 30 Cal. 458; McMasters v. Blair, 31 Pa. St. 467; Comp. Laws 1879, sec. 7, ch. 27, p. 316; Code, sec. 599; *Ex parte* Sibbald, 12 Pet. 492: *Ex parte* Dubuque, etc. R. Co., 68 U. S. 69. The evidence introduced does not sustain the new or additional finding of fact, and the court below had no power within the direction of the mandate of this court to grant a new trial, or to go back to the evidence produced upon the first trial, and therefrom make an additional finding so as to uphold and cure a judgment which this court pronounced erroneous, and reversed. The district court had no power to set aside the judgment of this court. Its authority upon the record extended only to executing the mandate.

Counsel for defendant allege that the action of the district judge was warranted by the language used by this court in Conroy v. Perry, 26 Kan. 473. Counsel has evidently an erroneous conception of that case. It was stated therein that the district court, when instructed by this court to enter a specific judgment in a case reversed, may, upon a new and different presentation of facts, give rights to either party and proceed to inquiry and judgment thereon; but this discretion can only be exercised upon the presentation of new facts. When a case is heard upon proceedings in error in this court, and the merits of the case are passed upon and the judgment of the inferior court reversed, with direction for the entering of a judgment, the case is not to be retried by the trial court upon the old facts; nor is the defeated party permitted to introduce other facts, which ought and might have been presented upon the original trial. On the proceedings of the district court, subsequent to the filing of the mandate in Duffitt v. Tuhan, no additional or new facts were presented to justify the court's action. The pleadings were not changed, no supplemental petition was filed, no affidavits were read, and the evidence offered was not worthy of consideration. Again, in Conroy v. Perry, *supra*, the district court held the supplemental petition to be insufficient, and therefore the rights of Perry were in no way prejudiced by the leave given to file the supplemental petition. Further, the final judgment rendered therein by the district court was the judgment substantially directed by this court in the mandate sent to that court. Where cases are decided by this court upon the facts found by the trial court, and the judgment of the inferior court is reversed, and a mandate sent to that court to render judgment upon the findings for the defendant, and no new or additional facts are presented within the rule stated, the duty is cast upon the court below to carry out the direction of the mandate. If the district court, under such circumstances, does not carry the judgment into execution according to the mandate, a *mandamus* will issue from this court ordering the mandate to be obeyed.

It is, therefore, ordered that a peremptory writ of mandamus issue to the judge of the District Court of Leavenworth County, commanding that judgment be rendered in accordance with the mandate of this court, a copy of which is set forth in the answer of this case.

Valentine, J., concurring.

Brewer, J.

I desire to add a few words in reference to the questions in this case. I was not present at the argument and therefore shall say nothing about the facts. I understand that counsel for defendant rested the action of the district court, mainly on the opinion filed in the case of Conroy v. Perry, 26 Kas. 472. The claim which was made in that case, and to which the opinion was directed was that under no circumstances could the district court do anything other than enter judgment in accordance with the mandate of this court. That, it was said, is the end of the litigation. The record was entirely silent as to the showing made for further proceedings and the only question was whether, under any circumstances, further action might be had by the trial court. Nothing was said in briefs or argument as to the showing necessary to justify such action, but the power was absolutely denied. It was held that the power existed. I see no reason to doubt the power, neither do I understand my associates as questioning its existence. In a certain sense the judgment in this court is an end of the litigation. So also it may be said that any judgment is an end of the litigation. It is a finality, and yet not absolutely final. Take a judgment in a district court. When it is once entered, there is said to be a final adjudication. Neither party can come into court and by simply saying he has more, or different testimony, have the judgment set aside and the matters in issue re-litigated. The reply to such an application would be:—you are too late the matter is at end. And yet every lawyer knows that such a judgment is not absolutely final even in that court. By motion or petition, a reinvestigation may be had within days or even months thereafter, and the statute provides within what time, and upon what conditions such further inquiry may be had. Code of Civil Procedure, secs. 306 to 310; Sexton v. Lamb, 27 Kas. 432.

Now, I suppose, that when a mandate goes back from this court directing the entry of a judgment, the judgment should be entered in conformity therewith. But even then, upon proper petition and showing, further proceedings may be had the judgment opened up, and the issues re-litigated. But this can not be done upon the mere application of a party. That would make the judgment of the appellate less of a finality than that of a trial court. There must be a showing of new

facts or newly discovered testimony, such as would make an opening up of the judgment and a re-examination justifiable. And such application must in the first instance be made to the district, and not to this court. While the language of the opinion in Conroy v. Perry, *supra*, may not have been as guarded as it should have been, this was all that was then in contemplation. There is one thing in that opinion, however, which I think should be corrected, in which correction my associates concur. It was then said that in the silence of the record, it would be presumed that a sufficient showing was made to the district court. That rule we think is wrong. The judgment of this court should be presumed the end of the litigation, and before any further action by the trial court, other than entering the judgment in conformity to the mandate can be sustained, it should affirmatively appear in the record that a sufficient showing therefore was made.

Again, my impression when this question was first presented, was that the plaintiffs had not sought the proper remedy; that no mandamus would issue to compel obedience to a mandate; that if the mandate was only disobeyed, an attachment as for contempt was the proper proceeding; and that if the action of the district court was predicated upon some showing made by either party, a proceeding in error was the only remedy. But the authorities cited in the opinion from the Supreme Court of the United States, go to the effect that mandamus is the appropriate proceeding.

I believe this is all that I care to add to what is said by the court in the opinion of the chief justice.

BAILMENT — GRATUITOUS DEPOSIT OF BONDS IN BANK—NEGLIGENCE.

WHITNEY v. FIRST NATIONAL BANK OF BRATTLEBORO.

Supreme Court of Vermont.

1. The plaintiff delivered to the defendant bank $4,000 of U. S. bonds, and received this writing: "Received of J. W. Whitney four thousand dollars, for safe keeping as a special deposit. S. M. Waite, C." *Held*, that it was a naked deposit without reward; that the defendants would not be liable for the robbery or larceny of the bonds, unless there was complicity or bad faith; that it was answerable only for fraud or for gross neglect; that the law demands good faith, and the same care of the plaintiff's bonds as defendant took of its own of like character.

2. The bonds were not delivered at the solicitation of the defendant; the bailment was gratuitous; and it was error for the court to allow the jury to speculate as to the benefit derived from the purchase and sale of coupons.

3. It was error to instruct the jury that there might be a benefit to the defendant, "perhaps in the sale of the bonds," when by the contract it had no right to sell or use the bonds, and also error in using these words, "perhaps in some other way," a way not disclosed by the evidence.

4. Evidence showing that other depositors of bonds in this bank had been misused, or wronged by the cashier, is not admissible to prove that the plaintiff was.

5. The facts that the safe was left open during the transaction of business, that there was no gate in the passage way from the rear of the banking room, behind the counter, that only one person was left in charge of the bank about noon each day, do not seem so unusual as to be accounted negligence, much less gross negligence.

6. The true test of gross negligence in this case is whether the defendant took the same care of these bonds as it did of its own.

7. No notice having been given the defendant to produce its books, no request for their production during the trial, no evidence that there was any entry in them touching the bonds, and the books being in the hands of the receiver, it was error for the court to charge that their non-production might be considered bythe jury to the defendant's prejudice.

8. If a party fails to call for books, when he has a right to have them, it will not be presumed that there are entries in them beneficial to such party.

Case for negligence in keeping certain United States bonds. Plea, general issue. Trial by jury, March Term, 1881, Taft, J., presiding. Verdict for the plaintiff to recover $7,149.89. The facts in this case are sufficiently stated in the opinion of the court, and in the 50 Vt. R. 388, where this case is reported, except the following request by the defendant and charge to the jury. The defendant requested the court to charge the jury:

"11. Upon the gratuitous bailment existing, the defendant is only liable for gross negligence in the keeping of the bonds, whereby they were lost.

"12. And if the jury find that the bank was robbed of the bonds, the defendant is not liable except it was guilty of some gross negligence which occasioned the loss.

"13. Such negligence is equivalent to fraud and can not be presumed or inferred, but must be in some particular which can be stated, and must be proved by the plaintiff in order to entitle him to recover.

"14. The true test of gross negligence is whether the defendant took the same care of the plaintiff's bonds as it did of its own. That is the measure of its undertaking, both as defined by law, and as actually occurred between the parties upon the statement of both parties."

The court charged, among other things:

"Now, this was a contract to keep the property, the bonds of the plaintiff, safely. I believe it reads, 'for safe keeping.' There is evidence tending to show that it was made at the solicitation of the cashier of the defendants. And the proof being, or the concessions in the case being, that the defendant was acting in the line of taking special deposits in that business, whatever the cashier did in the business would be the act of the defendant itself. And there is evidence tending to show that the bank received a benefit from this special deposit and deposits of like character by the purchase and sale of the gold coupons; and

perhaps in some other way; perhaps in the purchase and sale of the bonds themselves. There is evidence in the case which tends to show that they purchased these coupons which were payable by the government in gold, which at that time was bearing something of a premium, and buying them at a less rate than the market quotations of them at the time that they purchased, a difference being made, the price depending upon the state of the market, and whether it was regular or settled. Of course if the market was steady for a long time, and quotations were regular at one rate, they could perhaps afford to pay nearer to it than they could where the market was fluctuating and prices changing from day to day.

"If you find that this contract was made and these bonds delivered, the special deposit made at the solicitation of the defendant, with the expectation of receiving gain and benefit, and they did receive such benefit, or expected to do so, by the buying and selling of the bonds, or in any other way that justified them in their action, with reference to the matter, or that induced it, or in keeping a set of customers that they wished to have deal at the bank, or for any other reason that was satisfactory to them, although nothing was paid in money by the plaintiff to the defendant for taking these bonds and taking care of them; in that case the court tell you that the defendant was bound to exercise ordinary care and diligence in the custody of these bonds, such care and caution as a prudent man would exercise where he is guided by those considerations which ordinarily regulate the transactions of human affairs; the same rule which is conceded to be the law, and which the court tell you is the law, that exist in those cases where the bailment is one for hire or reward, as it is called; the same rule of diligence that would be required of the bank in case Mr. Whitney went to the bank and said: 'I will pay you one per cent. annually for keeping these bonds.' That is a bailment which is called one for hire or reward."

Kittredge Haskins and *E. J. Phelps*, for defendant.

The bailment was gratuitous; if so, the defendant was only liable for loss of the bonds caused by gross negligence. Coggs v. Bernard, 2 Lord Ray, 909; Foster v. Essex Bank, 17 Mass. 501, 479; Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N. Y. 278. First Nat. Bank of Carlyle v. Graham, 100 U. S. 644; Scott v. Nat. Bank of Chester Valley, 72 Penn. 471; DeHaven v. Kensington Nat. Bank, 81 Ib. 95; Nat. Bank of Allentown v. Rex, 89 Ib. 308; Smith v. First Nat. Bank, 99 Mass. 605; Jenkins v. Nat. Vill. Bank, 58 Me. 275; Spooner v. Mattoon, 40 Vt. 300; Story on Agency, sec. 16: Schouler on Bailm., pp. 15-54; Story on Bailm., sec. 23.

Gross negligence is a degree of negligence that is equivalent, or nearly equivalent, to fraud. It is precluded where the bailee takes the same care of the deposit as he does of his own similar property. It is not the want of the care exercised by the most prudent man, but of that employed by "the most inattentive." Coggs v. Bernard, *supra*; Foster v. Essex Bank, *supra*: Tompkins v. Saltmarsh, 14 Serg. & R. 275; Nat. Bank of Allentown v. Rex, *supra*; Story on Agency, sec. 16-19; Schouler on Bailm., *supra*; Jones on Bailm., sec. 8; Scott v. Nat. Bank of Chester Valley, 72 Penn. 471.

It is well settled that officers of a corporation can make no admissions that will be evidence against it, except where such admissions are part of the *res gestæ* which is in itself admissible. No antecedent or independent fact can be so proved. Ang. & Ames Corp., pp. 299-300; 1 Greenl. Ev., sec. 436; Story on Agency, 115; Ruby v. Hud. Riv. R. Co., 17 N. Y. 131; Hamilton v. New York Cent. R. Co., 54 Ib. 334; Nat. Bank of Lyons v. Ocean Bank, 60 Ib. 278; Underwood v. Hart, 23 Vt. 120.

Martin & Eddy, for plaintiff.

In the case of bailment, it has been always understood and held that if the bailee spontaneously proposes to keep the goods of another, he is answerable for the want of ordinary care, or, in other words, he is held to the same degree of care that he would be if he was receiving a just compensation for keeping the goods. 2 Kent. Com. 565; Jones Bail. 55; Story Bail. 80, 81; Schouler Bail. 39; Newhall v. Paige, 10 Gray, 268; Story Bail. 153; 1 Parson Con. 431; 1st Thompson Nat. Bank Cases, 466.

If defendant took upon himself the burden of exercising a greater degree of care than he otherwise would have been obliged to take, he is liable if he fails to perform. Schouler Bail. 21; Story Bail. s. 71, p. 77; Jones Bail. 54; 2 Kent Com. 560; 2 Par. Con. 94. The defendant's fourteenth resquest should not have been granted. Sher. & Redf. Negl. 19; Doonan v. Jenkins, 2 Ad. & El. 256; Rooth v. Wilson, 1 B. & Ald. 59; Schouler Bail. 44, 45, 46; 2 Par. Con. 91, 92, 93; 2 Kent Com. 563.

In no case that we have been able to find has it been claimed or held that the question whether the benefits or expected benefits to be derived by the bailee from such deposits might not have formed the basis of and induced the solicitation, nor that this was not a proper question to submit to the jury, and one which would warrant them, from the receipt or contract itself, the language used and the surrounding circumstances in finding that these did constitute an inducement and consideration to the bailee upon which his promise to keep safely was made. Foster v. Essex Bank, 17 Mass. 479; Scott v. Nat. Bank of Chester Valley, 72 Penn. 471; Leach v. Hale, 31 Iowa 99; Newhall v. Paige, 10 Gray 366; Lawrence v. McBalmont, 2 Howe 452. Reasonable care demanded by a gratuitous bailment. Schouler Bail. 42, 58; 2 Kent Com. 560; Sher. & Redf. Negl. ss. 21, 23; Newhall v. Page, 10 Gray 366; Ludor v. Lewis, 3 Met. (Ky.) 378.

REDFIELD, J., delivered the opinion of the court.

I. This is an action on the case, charging the defendant with negligence and want of care in keeping $4000 of U. S. bonds as a special deposit, and by which negligence said bonds were lost. The defendant executed and delivered to the plaintiff, on delivery of the bonds, the following contract or receipt:

"The National Bank of Brattleboro, Brattleboro, Vt., July 23d, 1866. Received of J. D. Whitney, four thousand dollars for safe keeping, as a special deposit. S. M. WAITE, C."

The written contract states the understanding of the parties, and by that the obligation and duties of the defendant must be determined. The words in the contract "for safe keeping," merely express the purpose of the deposit; and it would be implied if it had not been expressed. It was, as we think, a naked deposit, without reward. The possible conjectural benefit that might accrue to the defendant by purchasing the coupons, if the depositors should offer to sell them to the bank, when there was no obligation to do so, is too remote. The bank would be supposed to have provision for greater security for the safe keeping of money and valuable papers, than dwelling-houses and other ordinary buildings; and it would be implied that these bonds were to be kept in the vault of the bank, and with the same security as the bank afforded to valuables and papers of like character of its own; and a less degree of care and diligence would be required than if the bonds had been received by the defendant for hire and reward, or for some temporary use of its own.

The exact measure or responsibility of a naked bailee, without reward, is stated in somewhat different language by text writers, and in the adjudged cases. Sir Wm. Jones states: "That a bailee of this sort is answerable only for fraud or for gross neglect, which is considered as evidence of it, and not for such ordinary inattentions as may be compatible with good faith. * * * * In this case the measure of diligence is that which the bailee uses in his own affairs." The nature of the property and purposes the parties had in view, as appears from the quality of the property and character of the act of deposit, are a part of the case. Banks are instituted, and their buildings constructed, for the delivery in, and safe-keeping of, money and money securities; and these bonds were deposited in the defendant's bank for the greater security of the bonds,—"for safe keeping." And it must be implied that the defendant undertook to use all the appliances for the security of its own property for "the safe keeping" of the plaintiff's bonds, and in good faith. But it would not be liable for the robbery or larceny of the bonds, unless there was complicity or bad faith. The defendant requested the court to charge the jury that upon the evidence the bailment was gratuitous. The court declined so to charge, but did charge that the bonds were delivered at the solicitation of the defendant. The plaintiff testified that the cashier passed the bonds in an envelope to the plaintiff on the counter of the bank, and remarked: "You can leave these bonds, if you would like to, for safe keeping." Plaintiff inquired, "if they would be safe to leave them there?" The cashier replied, "they will be as safe as our own property." There was in this no solicitation for the custody of the bonds, or suggestion of expected benefit, but merely a suggestion that he might leave them if he chose to, and they would be safe as their own property. The bank obtained no right to sell or use the bonds, but a naked custody. If the plaintiff left the bonds, after the interview as detailed by himself, it was of his own free will and choice. The court charged the jury that there was evidence of a special agreement to keep the bonds safely. But, as has been intimated, the leaving the bonds for "safe keeping," or accepting them for that avowed purpose, is not a covenant or warranty that the defendant will protect the bonds absolutely from all danger, or indemnify the plaintiff against loss, but is rather a declaration of the purpose of the parties placing them in the defendant's safe, and giving the protection and immunity which the means of safety in the bank afforded like securities of the defendant.

The court further charged that there was evidence in the case tending to show that "the bank received benefit from the special deposit by the purchase and sale of the gold coupons; and perhaps in some other way; perhaps in the purchase and sale of the bonds themselves."

It is to be noticed that the contract gave the defendant a naked custody of the bonds, without any right to sell or use the bonds or coupons. If plaintiff should thereafter elect to sell the coupons to the defendant, it was a matter of choice, and we see nothing in the case evidencing that in the sale of coupons to the defendant there was other benefit than an accommodation to the plaintiff.

We think the court erred in allowing the jury to go into speculation and conjecture to conceive a possible benefit to the defendant from the deposit in order to find a different rule of liability than that imposed by the contract. It was error to instruct the jury that there might be benefit to the defendant "perhaps in the sale of the bonds," when by the contract it had no right to do so; and "perhaps in some other way," a way not disclosed by the evidence or known to the court. This being a naked bailment, without reward, the legal rights and duties of the parties arise from the character of the property and relation of the parties. And when "the winds are let loose," and the imagination has no rein, arising from the loss of property, by the alleged robbery of a public money institution, affecting the rights of many persons, it is the more incumbent upon the courts to keep the case "well anchored" in the law, and keep out of the case all evidence, especially combustible matter, that does not legally affect the rights and duties of the parties. The rule of law affecting this class of bailments (unless there be special facts which qualify the duties which this

case does not disclose), would require this defendant, considering the nature of the property, to have kept the bonds, in good faith, within its safe, under all the safeguards afforded to like property of its own. This is the concurrent rule of the civil and common law. Jones on Bailm., pp. 122-123, p. 46, note 18; Lord Holt, in Coggs v. Bernard, 2 Lord Raym. 915; 2 Kent Com. 562; Foster v. Essex Bank, 17 Mass. 479; First Nat. Bank of Carlyle v. Graham, 100 U. S. 644.

The plaintiff claims that there was evidence of negligence of the defendant, in this, that there was a passage way from the rear of the banking room, behind the counter, not protected by a gate; that the safe was left open, during business hours, for convenient access of the bank officers in the transaction of business; that a short time, about noon, each day, the bank was left in charge of one person, while his associate was absent to dinner. Negligence was a fact to be proved by the plaintiff to the jury. But there would seem nothing so unusual in these facts, if proved, that they could be accounted negligence, much less gross negligence, such as would charge the defendant. A gate was proved to be in use in some banks, and would be in a measure,doubtless, a barrier against intrusion, but slight in its character. New appliances for the safety of property are suggested by experience, and applied from time to time if found useful, but none have been found that subtle villainy can not surmount or evade. All banks have not the same protection against fire, robbery and violence, and none are absolutely safe. Men have been gagged and robbed in the banks and on the streets. Yet men continue to travel the streets with money and valuable papers in their pockets, and cashiers continue during business hours to manage banks alone in the country villages of this State, and it is deemed safe. Robbery at midday in a country village, like lightning or the whirlwind, is not kept in mind as a present danger. When a loss occurs, the mind becomes quickened, and conceives that this or that precaution would have averted it. There are manifold inventions for the security of property, fire-proof and burglar locks and safes, and more appliances in the cities where the amount and exposure is greater, but all are not the same. But where a deposit is made in a country bank or country store for safe keeping, the law implies a duty to employ the means of security, and keep it as he does his own.

II. To prove the loss of the bonds by the defendant's negligence, the plaintiff introduced the depositors of bonds, of different character, at various times with the defendant for safe-keeping; and they were allowed against defendant's exceptions to state their several interviews with Waite, the cashier of defendant's bank. In one case the depositor had lost his receipt for the bonds, and the cashier declined to account for the bonds until the receipt was produced; and when he found the receipt he intimated to the cashier that he would have lost the bonds if he had not found the receipt, whereupon the cashier requested him to leave the bank. If Waite was in the wrong in that altercation, it is not easy to see how it should prejudice the defendant in this case. No property was lost, but the witness intimates that Waite showed an improper disposition. It should be noticed that this evidence was offered, on the opening of the case, to prove the averments in the declaration, that plaintiff's bonds were lost by the negligence and want of care of the defendant. Most of this evidence does not tend to show a want of care but rather with the want of good faith in purpose and intentions. Many of the contracts of the depositors were unlike this; and in one case the cashier was specially authorized to cut off the coupons, as they became due, and give credit for them on the bank books, and the using of the coupons did not tend to show a wrongful appropriation. It would not do to prove that other depositors and customers of the bank had suffered insolence or wrong at the hands of Waite, and therefore infer this plaintiff may have suffered in some manner by the misconduct of Waite. Most of the detailed interviews between other depositors and Waite are matters *inter alios* and not a part of the *res gestæ* in issue in this case, and therefore not legal evidence in this case. If it had been offered to rebut that part of the defense, that the bonds in question were lost by robbery of the bank, some part of the testimony of the other depositors might perhaps be properly admissible, so far as any of the testimony might tend to show the bonds deposited for safe keeping, or other property in the bank, had been wrongfully abstracted or embezzled by an officer of the bank; but no recovery could probably be had on that ground under this declaration, as it has been stated to us in argument. The fact that the defendant received on deposit bonds other than the plaintiff's was, of course, properly admissible.

III. In regard to the charge of the court and the many exceptions to it, as the case must be sent back to the county court for another trial, we omit to say more than we have already said, except that on this matter of the defendant's liability, we think he was entitled to have his eleventh, twelfth, thirteenth and fourteenth requests complied with. We think, also the charge of the court that the non-production of books of the bank by the defendant might be considered by the jury to its prejudice was error. No notice had been given to the defendant to produce the books; no request for their production during the trial; no evidence in the case that there was an entry on the books touching these bonds, and the books were then in the hands of the receiver. If the plaintiff wished the books of the bank in evidence he should have called for them in some propor way, or otherwise "held his peace." And we see no ground of presumption that there were entries on said books that would have been of benefit to either party.

Judgment reversed and cause remanded.

WEEKLY DIGEST OF RECENT CASES.

1. CONTRACT — BENEFIT OF THIRD PARTY — ENFORCEMENT.

Where A made a proposition to erect a schoolhouse in the county which should contribute a certain sum, and B contributed to that sum: *Held*, the contract was one which could be enforced. The question as to whether B was released by a failure of A to complete the building in a proper time, is one for the determination of the jury. *Williams v. Rogan*, S. C. Tex., May 18, 1883; 2 Tex. L. Rev., 84.

2. EMINENT DOMAIN—MORTGAGED LAND— FORECLOSURE.

1. A railroad company by a warranty deed from a mortgagor of lands for railroad purposes, takes only the right and title of the mortgagor, the mortgagee being ignorant of the transaction; and in a foreclosure proceeding the company can make only the same defense that the mortgagor could. 2. And this is so although the railroad could have taken the land under the exercise of the right of eminent domain. 3. And, although the mortgagor paid the consideration received for the deeds to the mortgagee. *Wade v. Hennessey*, S. C. Vt., Reporter's Advance Sheets.

3. ESTOPPEL—TO DENY FORGERY.

A person can not be estopped from declaring his signature to a note a forgery merely because after plaintiff had taken the note he did not notify her that it was a forgery as soon as he knew that his name purported to be signed to it. *Zell's Appeal*, S. C. Pa., May 7, 1883; 40 Leg. Int., 350.

. FIXTURES — REAL OR PERSONAL PROPERTY— BUILDING ON ANOTHER'S LAND.

Whether a building, erected by one person on the land of another, with the latter's permission, is real or personal property, s a question of fact depending on the actual or imputed intention of the parties. *Pope v. Skinkle*, S. C. N. J.; 16 Rep., 308.

. FRAUD — MISREPRESENTATION — RESCISSION OF CONTRACT.

F, G and J planned to inveigle L into purchasing certain land. They knew he could not get a good title to it. They had been informed that he would not purchase unless that could be done. They misrepresented material facts, as to which he, being at a distance, had not equal means of information, and for a true statement whereof he had a right to rely on them. On a bill by L against F, G and J, for rescission of the contract and deed whereby F conveyed the land to L, and for repayment of $3,500, cash paid, and for surrender of his bond for $1,500, deferred payment, on the ground of fraudulent representation or false representation as to validity of title and freedom from encumbrance of the widow's dower. *Held*, 1. A false representation of a material fact constituting an inducement to the contract, on which the purchaser had a right to rely, is a ground for the rescission of the contract by a court of equity, although the party making the misrepresentation was ignorant as to whether it was true or false; and the real inquiry is not whether the vendor knew the representation to be false, but whether the purchaser believed it to be true and was misled by it into the contract. In such case, whether the false representation was innocently or wilfully made, the effect is the same on the purchaser. 2. To entitle the person making the misrepresentation to defend on the ground that the purchase was not induced by it, he must demonstrate that it was not relied on by the purchaser. 3. This is a case of actual fraud, which entitles L to relief in equity by rescission of the contract and return of the money and bond given for the land. *Linhart v. Foreman*, S. C. App. Va., May 3, 1883; 7 Va. L. J., 541.

6. LANDLORD AND TENANT—REMOVAL OF BUILDINGS—CONSTRUCTION OF LEASE.

A tenant whose lease in terms gives the right to remove, at the expiration of his term, buildings which he may have erected, may exercise that right within a reasonable time after his term expires. If the removal is not affected within a reasonable time, the right of removal ceases. About five months after the expiration of the prescribed term of a tenancy, judgment of restitution was awarded in summary proceedings against the tenant. The judgment not being enforced by writ, the tenant remained in possession a month longer, and then commenced the removal of a small frame dwelling-house erected by him during his term, an instruction to the jury which in effect declared that the right of removal had not been forfeited, *Held*, to be erroneous. One who has taken from a tenant a chattel mortgage upon a building erected upon leased land, acquires no better right than the tenant had, and cannot remove the property after the tenant's rights of removal have expired. *Smith v. Park*, S. C. Minn., July 25, 1883; 16 N. W. Rep. 490.

7. NEGLIGENCE—EVIDENCE—BURDEN OF PROOF— REMOTE DAMAGE.

The fact, unexplained, that a very unusual volume of sparks was thrown from a railroad engine, whereby fire was set to adjacent property, *held* to be evidence of negligence; it appearing also that the management of an engine has much to do with the throwing of sparks. A presumption of negligence arising under the statute, and the burden being upon the defendant to show carefulness in the management of the engine, the testimony alone of the engineer that he "handled the engine very carefully," but "not any differently from what I (he) generally did," *held*, not such proof of carefulness, under the circumstances, as to compel a conclusion by the jury that there was no negligence. The fire was first set to the property of one Niskern, thence to a neighboring barn, and thence to the property of plaintiff, about 60 feet from the point where the fire was first set. *Held*, that the injury was not remote, as a matter of law. *Held*, also, that the negligence of Niskern, in leaving combustible matter exposed to the danger of fire from the railroad, was not an intervening cause interrupting the legal relation of cause and effect, as between the negligence of the defendant and the burning of plaintiff's property, but rather that Niskern's negligence was concurrent with that of the defendant, either one of the wrong-doers being answerable for the conse-

quences. Refusal of court to grant a continuance, and rulings upon the reception of evidence, sustained. Rule applied, that irrelevant evidence, which could not have affected the result, furnishes no ground for a new trial. *Johnson v. Chicago etc. R. Co.*, S. C. Minn., July 18, 1883; 16 N. W. Rep. 488.

8. NEGOTIABLE PAPER — INDEFINITE EXTENSION DOES NOT DISCHARGE INDORSER.
A, a banking-house, held a note indorsed by B, upon which it had obtained judgment against the maker, C. A agreed with C to extend the time of payment of said note, if C would pay ten per cent. interest thereon, and continue his banking business with A. In a suit on the note by A against B: *Held*, that this extension of the time of payment was indefinite and did not discharge B. Subsequent to the entry of said judgment against C, and in pursuance of said agreement, C had sufficient sums of money on deposit with A to pay said note. *Held*, that A was under no legal obligation to apply said sums in liquidation of the note, and his omission to do so did not discharge B. *Semble*, that if A had had sums of money of C on deposit at the time of bringing suit against B, B could have availed himself of C's right of set-off against the bank. *People's Bank v. LeGrand*, S. C. Pa., May 25, 1883; 15 Lanc. Bar. 57.

9. PRACTICE—JURY TRIAL—DIRECTING A VERDICT—JUDICIAL DISCRETION.
The verdict of a jury or the findings of a court upon a question of fact should not be disturbed, the evidence being conflicting, unless great injustice seems to have been done, or there is an entire want of evidence to sustain it. When the judge is clear of doubt that a verdict ought to be rendered, either for the plaintiff or the defendant, and that it would be his duty to set a contrary one aside, he ought to instruct the jury so to find. On the other hand, such a direction cannot be properly given to the jury unless the evidence is such as to leave no room for doubt that it is the duty of the judge to find accordingly. Where, conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, it is not sufficient to justify a verdict, it is the duty of the court after a verdict to set it aside and grant a new trial. There being a want of evidence to support the verdict, and no conflict thereof so far as it relates to the grievance complained of in this case, the judgment below is reversed and a new trial ordered. *Finney v. N. Pac. R. Co.*, S. C. Dak., June 30, 1883; 16 N. W. Rep. 500.

10. REAL PROPERTY—PAYMENT OF TAXES ON LAND OF ANOTHER—ADOPTION—LIMITATIONS.
Where a person pays taxes on land under the impression that he is the legal owner thereof, and the true owner adopts such payments and claims the benefit thereof, in an action by the county in which the land lies to recover such taxes, the party making such payments is entitled to be re-imbursed thereto by the owner. As, in this case, the owner's liability arose by reason of his adoption of the payments, in the defense set up by him in the action brought by the county, the statute of limitations would run from that time, and not from the date of the payment by the supposed owner of the land, and would not bar his action to recover the amount so paid. *Goodnow v. Stryker*, S. C. Iowa, June 12, 1883; 16 N. W. Rep. 486.

11. SUNDAY LAW—RUNNING STREET CARS—ORDINARY LABOR.
1. A horse car which is run on Sunday for the purpose of accommodating the public generally and earning money from whoever may see fit to travel upon it, is run in violation of the Lord's Day Act, although some of the passengers are lawfully traveling. 2. A conductor of a horse car, who is performing the ordinary duties of his employment on Sunday, is both laboring and traveling in violation of the Lord's Day Act; and if, while standing on the outside step-rail of the car and leaning into the car for the purpose of collecting fares, he is injured by being struck by the car of another corporation passing on a parallel track, his illegal acts necessarily contribute to cause his injury, and preclude him from maintaining an action therefor. *Day v. Highland St. Ry. Co.*, S. J. C. Mass., May, 1883; 16 Rep., 335.

NOTES

——"And now, Mrs. Smith," said the counsel, "will you be kind enough to tell the jury whether your husband was in the habit of striking you with impunity?" "With what, sir?" "With impunity." "He was, sir, now and then; but he struck me oftener with his fist."

——A legal gentleman met a brother lawyer on Court street one day last week, and the following conversation took place: "Well, judge, how is business?" "Dull, dull; I am living on faith and hope." "Very good; but I have got past you, for I'm living on charity."

——The *Pall Mall Gazette* thinks that a lady whose mode of life recently occupied the common pleas division at Dublin, deserves no little credit. She had devoted her more mature years to the study of law, and more particularly to the law of breach of promise. The novelty of her case consisted in the number of actions which she managed to run at the same time. In her last case the unsusceptible jury awarded her only $50; but on her cross-examination in that case, she confessed to having just sued another gentleman, whom she "really loved," in spite of his seventy winters, and from whom she had obtained $500 damages. In a third case she is believed to have been more successful still, having induced the defendant to compromise it by a payment of $3,000. It is perhaps in view of the enterprise of this lady and of others who are carrying on a like lucrative industry, that an English judge remarked in court the other day, that he was not at all surprised that many people advocated the abolition of actions for breach of promise.